IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1409

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

—against—

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS

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Statement of Interest of Amicus Curiae

The American Association of Retired Persons ("AARP"), of 1909 K Street, N.W., Washington, D.C. 20049, is a not-for-profit membership corporation of more than twenty-three million persons over the age of fifty. AARP is the largest organized group of older Americans in the country. In representing the

interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the work force. Accordingly, AARP sought and received the consent of the parties to the filing of this brief *amicus curiae*.

Many members of AARP continue to work and contribute to the Social Security trust fund; many others, however, are claimants for and recipients of disability benefits under Titles II and/or XVI of the Social Security Act ("Act"), 42 U.S.C. §§ 401 *et seq.* and 1381 *et seq.*[1] In either case, the members of AARP have an interest in ensuring that the Social Security Administration ("SSA") properly determines initial disability claims and requests for continued disability benefits consistent with the Act, including the requirement that the age of claimants be appropriately considered in evaluating their "inability to work by reason of . . . [their] medically determinable physical or mental impairment[s]." 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A); *see also* 42 U.S.C. §§ 423(d)(2)(A) and 1382c(a)(3)(B) (establishing age as a factor).

Affirmance of the decision below will guarantee all claimants, but in particular those over 50 years of age, a proper individual assessment of their disability claims. The ruling below invalidated a threshold regulation that, as applied, established a stringent, overinclusive threshold step that was used to deny benefits to eligible claimants—a disproportionately large number of whom were over 50 years old. If the ruling is affirmed, individuals, including

[1] Title II establishes the insurance program that provides benefits to disabled workers who are fully insured, 42 U.S.C. § 423(a); to disabled widows, widowers and surviving divorced spouses of insured workers, 42 U.S.C. § 402(e), (f); and to qualifying children of insured workers, 42 U.S.C. § 402(d). Title XVI establishes the Supplemental Security Income ("SSI") available, *inter alia*, to disabled adults and children. 42 U.S.C. §§ 1381a, 1382c(a)(3)(A). Unless otherwise indicated, the edition for all United States Code citations herein is 1983 and Supp. 1986; and for C.F.R. citations is 1986.

AARP members in the various certified classes, will receive reevaluations that are proper under the Act[2] and, if eligible, the benefits which Congress intended they receive. If reversed, the Secretary will continue to have in place a regulation that can again be applied in a manner that will deny AARP members and others the benefits to which they are entitled. AARP urges affirmance of the Ninth Circuit's judgment.

ARGUMENT

SUMMARY OF THE ARGUMENT

I. A. The Act mandates that age be considered as a significant factor in determining disability. Congress, since 1956, has defined disability in the Act with reference to the claimant's age. Pub. L. No. 84-880 § 223, 70 Stat. 815 (1956), *codified at* 42 U.S.C. § 416(i) (1956). In 1968, age was explicitly introduced into the definition of disability as a vocational factor relevant to determining whether a claimant for benefits, who was unable to perform his past work because of his impairment(s), would be able to perform any substantial gainful activity in the national economy. Pub. L. No. 90-248 § 223, 81 Stat. 868 (1968), *codified at* 42 U.S.C. § 423(d)(2).

B. In this context, the claimant's age in the Social Security disability scheme is a highly individualized factor which by itself could result in differing results on claims for benefits by two individuals with identical medical conditions.

II. A. The Act authorizes the Secretary to determine disability consistent with the definition. It also allows a threshold screening of claimants who, regardless of their age, education,

[2] AARP notes that the Secretary has petitioned that this Court hold and dispose of at least two class actions, *Johnson v. Heckler*, 769 F.2d 1202, *rehearing en banc denied*, 776 F.2d 166 (7th Cir. 1985), *pet. for cert. filed sub nom. Bowen v. Johnson*, 54 U.S.L.W. 3600 (March 11, 1986) (No. 85-1442) (an Illinois class) and *Dixon v. Heckler*, 785 F.2d 1103 (2nd Cir. 1986), *pet. for cert. filed sub nom. Bowen v. Dixon*, 55 U.S.L.W. 3017 (July 15, 1986) (No. 86-2) (a New York State class), in light of the disposition here.

and work experience, have not presented an impairment that imposes enough limitations to ever be found disabling. This is known as a *de minimis* test.

In 1978, SSA adopted the current five-step disability adjudication policy, known as the sequential evaluation of disability, to determine whether a claimant met the statutory definition of disability. 43 Fed. Reg. 55349, 55363 (November 28, 1978), *codified at* 20 C.F.R. §§ 404.1520 and 416.920. In this sequence, the step two severity regulations, as applied by the Secretary, however, were not a valid *de minimis* step under the Act because the severity test screened out individuals—especially older claimants—who would have established eligiblity after a full evaluation of their claim.

The step two severity test was applied, at all relevant times, to deny a claim on the sole basis of medical records without any consideration *at all* of factors such as a claimant's age (or his actual residual capability to do his past work or any other work). 20 C.F.R. §§ 404.1520(c) and 416.920(c). This occurred because the step two denial shortcircuited the full evaluation of these factors which would not be provided until subsequent steps. *See Id.* at §§ 404.1520(f) and 416.920(f). As a result, the Secretary was denying claims at step two based solely on the nature of the medical impairment records irrespective of the claimant's age or functional ability to perform his past work.

B. Claimants who were at least fifty years old and who could no longer perform their past work were, in particular, losing claims for benefits at step two that would have been awarded—and were awarded prior to 1976—had the Secretary evaluated the claim at step five. The challenged step two regulations, therefore, have had a disproportionately adverse impact on elderly disability claimants in that step two denied them any consideration at all of a factor (age) that Congress had identified as crucial.

Because of repeated adverse court rulings holding that the step two severity policies as applied were not a *de minimis* step, the Secretary has recently attempted to change his construction of

the step two regulation (after seven years of implementation) by an interpretative ruling that purports to adopt a *de minimis* reading of the regulation. This 1985 ruling, Social Security Ruling ("SSR") 85-28 (October, 1985), was never applied to Ms. Yuckert. Moreover, it is a radical reversal from the Secretary's earlier interpretative rulings governing the application to claims of step two. *See* SSR 82-55 (effective Aug. 20, 1985) (Cum. Ed. 1982); SSR 82-56 (effective Aug. 20, 1980) (Cum. Ed. 1982). While the Secretary's apparent policy reversal may eliminate the adverse impact of the severity regulations on older claimants, no factual record on this new policy has been developed. Thus, it would be inappropriate for this Court to pass upon it. In the meantime, the Court should affirm the ruling below.

I. THE SOCIAL SECURITY ACT REQUIRES THE SECRETARY TO CONSIDER AGE AS A SIGNIFICANT FACTOR IN DETERMINING DISABILITY CLAIMS, AND UNDER THE ACT AN OLDER CLAIMANT MAY BE DISABLED BY REASON OF A MEDICAL IMPAIRMENT THAT WOULD NOT DISABLE A YOUNGER PERSON

A. The Social Security Act

When Congress established the Social Security Disability Insurance ("SSDI" or "Title II") Program in 1954, it provided disability benefits to insured individuals who were unable to work due to their medical impairments but only if they were between the ages of 50 and 65. Pub. L. No. 84-880 § 223, 70 Stat. 815 (1956), *codified at* 42 U.S.C. § 416 (1956). *See also* S.Rep. No. 2133, 84th Cong., 2nd Sess. 3-5, *reprinted in* 1956 U.S. Code Cong. & Ad. News 3877, 3941, 3947; S.Rep. No. 1987, 83rd Cong., 2d Sess. 21, *reprinted in* 1954 U.S. Code Cong. & Ad. News 3710, 3730; H.Rep. 1189, 84th Cong., 2d Sess. (1956). The program was expanded in 1960 to provide benefits to younger disabled workers. Pub. L. No. 86-778, § 401, 74 Stat. 967 (1960), *codified at* 42 U.S.C. § 423(a)(1960). When Congress did so, however, it left intact the definition of disability, as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." 42 U.S.C. § 423(d)(1)(A).

Then, in 1967, the definition of disability for SSDI was further amended to its current form. S.Rep. No. 744, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. Code Cong. & Ad News 2834, 2848. The Act's current definition of disability provides that a claimant must have a medically determinable impairment expected to result in death or to last twelve months, 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A), and further provides that:

> (2) For purposes of paragraph (1)(A) -
> (A) An individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . .

42 U.S.C. §§ 423(d)(2)(A); *see also* 42 U.S.C. § 1382c(a)(3)(B) (identical language).

The 1967 amendment was designed to check the "ero[sion]" of the "definition of disability" that had occurred "over . . . time." S. Rep. No. 744, 90th Cong. 1st Sess. (1967) *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2834, 2880. Congress was concerned that some court decisions had given the existing definition too expansive a scope, with the result that some claimants had been found eligible whom Congress did not think should receive benefits. *Id.* at 2880-1. It resolved this problem by restating the basic definition of disability in 42 U.S.C. § 423(d)(1)(A), in terms setting forth the specific factors that Congress considered relevant to the disability determination. *Id.* at 2881-82.

One of the factors that Congress specifically wanted to remain relevant to disability eligibility determinations was the claimant's age. The amended definition of disability thus expressly required that the "age" of a claimant unable to do his past work must be considered in deciding whether he was able to do other work. 42 U.S.C. § 423(d)(2)(A).

The 1967 amendment's incorporation of age merely codified what was, and must be, considered a relevant factor in determining whether a claimant exhibits an "inability to engage in substantial gainful activity by reason of any medically determinative . . . impairment."[3] This is because a claimant's age significantly affects such "inability." First, the same medical impairment may be more incapacitating to an older claimant than it would be for a younger one. Second, an older claimant may have a more difficult time in adapting his "residual functional capacity" ("RFC") -- his physical capacity to work, despite his medical impairment -- to new jobs than would a younger claimant. *See* 20 C.F.R. §§ 404.1563(a) and 416.963(a).[4]

B. Age Under The Regulations and Rulings

1. Slightness Test

Under SSA regulations in effect prior to 1978, a claim would be denied if the medical impairment was so slight that it did not reduce the claimant's actual ability to work. *E.g.*, 20 C.F.R. § 404.1502(a) (1976). If the impairment was more than slight, it was evaluated against a "guide," later known as the "listing", of *per se* disabling conditions. If the impairment was found to be not of sufficient severity to match the listing, the claim was evaluated under the totality of circumstances, including the claimant's ability to do his past work or any other work given his age and evaluation of other vocational factors. *E.g.*, 20 C.F.R. § 404.1502(b) (1976).

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[3] Prior to the 1967 amendment, age was specifically considered by the Secretary in making disability determinations. *See* Disability Evaluation Standards, § 325 (5/16/65), where the Secretary states that "in evaluating the effect of an impairment, it should be considered that the impairment may be more limiting for an older than a younger man" and that "[t]he aging process makes itself felt with respect to healing, prognosis, physiological degeneration, psychological adaptability and, in consequence, vocational capacity."

[4] *See* SSA Program Operations Manual System § DI00401.400A.2 (1-84) ("[R]eference sources and material dealing with chronological age in terms of vocational impact point to a direct relationship between age and the ability to adjust to work . . . [t]he regulations reflect age 55 and over as . . . representing the point when age could be expected to be an adverse consideration.")

2. Sequential Evaluation

The present sequential evaluation, adopted in 1978, is a five-step process by which the Secretary determines whether the claimant meets the statutory definition of disability. 20 C.F.R. §§ 404.1520 and 416.920. The fifth step of the Secretary's sequential evaluation process for the determination of disability claims specifically requires that if a claimant is unable to do his past work, SSA "will consider your residual functional capacity and your *age*, education and work experience to see if you can do other work." 20 C.F.R. §§ 404.1520(f) and 416.920(f) (emphasis added).

Under this sequential evaluation scheme, age is defined by the Secretary as chronological age. 20 C.F.R. §§ 404.1563 and 416.963. In the regulations, the Secretary explains that age is considered in determining disability because it "affects [a claimant's] ability to adapt to a new work situation and to do work in competition with others." *Id.* at (a). The Secretary divides age into four categories:

1. "Younger person . . . under age 50" for whom "age will [not] seriously affect [the] ability to adapt to a new work situation." *Id.* at (b);

2. "Person approaching advanced age . . . (50-54) for whom "age, along with severe impairment and limited work experience, may seriously affect [the] ability to adjust to . . . jobs in the national economy." *Id.* at (c);

3. "Persons of advanced age . . . (55 or over)" for whom "age significantly affects a person's ability to do substantial gainful activity." *Id.* at (d); and

4. Persons "close to retirement age . . . (60-64)" for whom age is even more limiting unless the claimant has "skills which are highly marketable." *Id.*[5]

[5] The comments accompanying the promulgation of these age classifications explained that "the statutory definition of disability provides specifically that

(Footnote Continued)

3. The Grids

To further provide uniformity and efficiency, the Secretary established the "medical-vocational" guidelines known as the "grids." 20 C.F.R. Part 404, Subpart P, Appendix 2. These are tables that determine whether a claimant who has reached the fifth step is disabled or not. The grid determination is made by reference to the four factors identified by Congress in the statutory definition of disability: physical ability, age, education and work experience.

The grids are three tables, each one tied to a particular residual functional capacity ("RFC"), i.e., the claimant's remaining ability to do the requirements of work despite his impairment(s). 20 C.F.R. §§ 404.1545 and 416.945 (defining RFC). There is one table for the RFC necessary to perform the exertional requirements of the three least demanding categories of work: medium, light and sedentary. 20 C.F.R. Part 404, Subpart P, Appendix 2; *see also* 20 C.F.R. §§ 404.1576 and 416.967; SSR 83-10 (January, 1983) (defining the physical exertion requirements of heavy, medium, light, and sedentary work). Each table is a chart directing a decision on the claim based on the various vocational factors of age, education, and work experience skills of the person retaining the particular RFC for that table. *See Heckler v. Campbell*, 461 U.S. 458 (1983).

Of the three vocational factors—age, education, and work experience—age is by far the most significant. For example, a claimant who retains the ability to perform medium exertional activities despite his impairments will be evaluated on Table 3.

vocational factors must be viewed . . . in terms of how the progressive deteriorative changes which occur as individuals get older affect their vocational capacities to perform jobs." 43 Fed. Reg. at 55353-54. Consistent with the categorization itself, the comments also explained that while "deteriorative changes . . . affect(ing) vocational capacities would most likely occur" at or after age 55, the age of younger claimants (from age 45) might also adversely affect their ability to work. Because of the progressive deteriorative nature of age, the age categories are not applied mechanically. *Id.* at 55354; *see* 20 C.F.R. § 404.1563(a). Age thus is the only vocational factor that is considered in a highly individualized, flexible manner. *Heckler v. Campbell*, 461 U.S. 458, 462 n.5 (1983).

Generally, a claimant, regardless of his vocational factors, will be found not disabled on this grid. *See* 20 C.F.R. Part 404, Subpart P, Appendix 2, Table 3. The exceptions depend on the claimant's age. No matter how limited his education nor how unskilled his past work experience, the grid directs findings of "not disabled" unless the claimant is either of "advanced age" (55 to 59) or closely approaching "retirement age" (60 and over). *Id.*, Rules 203.10 and 203.01.[6] No other vocational factor alters the result; age is the critical factor.[7]

In sum, the statutory definition of disability (42 U.S.C. §§ 423(d)(1) and (2) and 1382c(a)(3), and the implementing federal regulations (including the grids) have always made the

[6] The same is true on the other grids. For example, the light grid directs "not disabled" findings for claimants who are illiterate and have unskilled past work unless they are also of approaching advanced age. *Compare id.* at Table 2, Rule 202.16 *with id.* Rule 202.09 and 202.01. Age is as important on the sedentary grid. Thus, even where past work developed a person's skills, advanced age could still overcome that positive vocational factor to result in a favorable decision. *Compare id.* at Table 1, Rules 201.24 and 201.18 *with id.* Rules 201.09 and 201.01 (claimant will receive different results despite limited or less education, unskilled or no past work, wholly due to age differences); *See also Tom v. Heckler*, 779 F.2d 1250, 1256 (7th Cir. 1985).

[7] The significance of age remains unchanged under the Social Security Disability Benefits Reform Act of 1984, Pub. L. 98-460, 98 Stat. 1794, *codified at, inter alia*, 42 U.S.C. § 421(i). The Reform Act required the Secretary to revise the sequential evaluation for claimants already receiving benefits, but whose eligibility is being redetermined. *See* 50 Fed. Reg. 50135-50136, 50142-50143 (December 6, 1985), *codified at* 20 C.F.R. § 404.1594(f) and 416.994(b)(5). In explaining the revised test for such claimants, however, the Secretary emphasized the continued importance of age—and aging—to disability determinations:

> (4) Functional capacity to do basic work activities.
>
> (ii) Many impairment-related factors must be considered in assessing your functional capacity for basic work activities. *Age is one key factor.* Medical literature shows that there is a gradual decrease in organs function with age; that major losses and deficits become irreversible over time and that maximum exercise performance diminishes with age.
>
> 50 Fed. Reg. at 50132 (emphasis added).

claimant's age a significant, and often decisive, eligibility factor. Not all older (over 50) claimants will, of course, be found disabled; nor will younger claimants invariably be found not disabled. But the older a claimant is, the more he may be found to be unable to "engage in substantial gainful activity by reason of (his) medically determinable physical or mental impairment(s)." 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A). Thus, two claimants with the same RFC, education and work experience, but of different ages (*e.g.*, 38 and 58), will generally have their claims adjudged differently: on the grid, the older claimant will usually win, and the younger claimant will lose. 20 C.F.R. Part 404, Subpart P, Appendix 2, *passim*. While age is thus a relevant vocational factor for all claimants, it is an especially significant one for older claimants.

II. THE SEVERITY STEP REGULATIONS UNLAWFULLY DENIED DISABILITY BENEFITS TO MANY OLDER CLAIMANTS WHO, UPON A FULL EVALUATION OF THEIR CLAIMS, SHOULD HAVE BEEN FOUND ELIGIBLE

A. The Severity Step Regulations, As Applied, Were Not A Valid *De Minimis* Step Under The Act

For many older claimants, the central statutory vice of the severity step regulations at issue here (20 C.F.R. §§ 404.1520(c) and 416.920(c)) was precisely that they were read and applied by the Secretary to preclude any consideration of how the claimants' "age" affected their ability to work. Under the sequential evaluation, the Secretary specifically "will not consider [a claimant's] age, education, and work experience." 20 C.F.R. §§ 404.1520(c) and 416.920(c). This regulation was given detailed interpretation by the Secretary in two SSRs that are binding on all decision makers on disability claims. 20 C.F.R. § 422.408. SSR 82-55 provided, *inter alia*, a list of impairments that would always be determined to be non-severe. SSR 82-55 at 104-06. This SSR called for a denial of every claim presenting the listed impairment(s) regardless of whether the claimant could prove that the listed impairment was severe enough to prevent him from doing his past work or severe enough to render him disabled when his

residual capacity to work despite the impairment was considered with his age and other vocational factors. *Id.* at 04; *see also* SSR 82-56 at 112. In addition, the Secretary directed that two or more "non-severe" impairments could never be combined to establish a severe impairment that satisfied step two. SSR 82-52 at 104; 20 C.F.R. § 404.1522(b) and 416.922(b) (1984). The reduction imposed on a claimant's actual abilities, measured by his RFC, would not be considered at step two. 20 C.F.R. §§ 404.1520 and 416.920; SSR 82-55 at 103. It is these regulatory sources, and not the recently promulgated SSR 85-28,[8] that defined the Secretary's step two severity test as applied to Ms. Yuckert below.

The Secretary now vigorously defends the legitimacy of a *"de minimis"* step two standard. Brief for the Petitioner ("Pet. Br.") at 17. Under this threshold test, as described by the Secretary himself, a claim may be denied at step two without an "individualized vocational evaluation" (i.e., without an individualized assessment of the effect that the claimant's age, education and work experience might have on his ability to work), only "where a medical assessment establishes that the claimant's impairment is sufficiently insubstantial that it reasonably could not be expected to preclude all substantial gainful activity, irrespective of the claimant's age, education and work experience." *Id.*, *see also id.* at 26-27 (similar formulations). In essence, a *de minimis* threshold step would, by its terms, allow summary "medical evidence" denials – denials without full consideration of the claimant's vocational factors. But it would only deny benefits to

[8] After the court of appeals decision below, the Secretary published a new Social Security ruling (SSR 85-28) that he describes as "clarifying the application of the severity standard at step two of the sequential evaluation process." Brief for the Petitioner at 10. Neither SSR 85-28 nor a later companion ruling (SSR 86-8) (Jan. 1986) were applied to respondent's case. For this reason, and others discussed by respondent in her brief, we agree (with respondent and the other *amici* urging affirmance) that it would be inappropriate for this Court now to consider the validity of these rulings in any way, particularly where there has been no opportunity for the development of a relevant factual record or for lower court scrutiny of the rulings in light of such record.

claimants who could not possibly meet their ultimate burden of proving disability because, *even if* their vocational factors *were* fully considered at step five, they would not establish an inability to engage in substantial gainful activity.

The Secretary plainly has the authority to "screen out" claimants with no likelihood of success on their claims, at an early stage of the eligibility determination process. And if the Secretary's step two severity regulations, at issue here, had been read and applied consistently with a *de minimis* standard, the step two severity test would have been consistent with the Act. This is because a *de minimis* test by its terms respects the statutory allocation of the burden of proof. Under this allocation, a claimant who shows an inability to do his past work shifts the burden to the Secretary to make a fully individualized assessment of whether his medical impairments render him unable, "considering his age, education and work experience, [to] engage in any other kind of substantial gainful work." 42 U.S.C. §§ 423(d)(2)(A) and 1382c(a)(3)(B).[9] The problem for the Secretary is that his severity regulations were neither read nor applied as a *de minimis* standard.

The case law establishes that the Secretary has not applied the severity regulations at issue here consistently with a *de minimis* standard.[10] Thus, claims were denied at step two even where consideration of vocational factors, especially age, might have resulted in a determination that the claimant met the statutory definition of disability.

[9] All twelve courts of appeals have interpreted the statutory allocation of the burden of proof in this way. *See Johnson v. Heckler*, 769 F. 2d at 1210 (citing cases). The court below properly held, *inter alia*, that the severity regulations transgressed this statutory allocation of the burden of proof. *Yuckert v. Heckler*, 774 F.2d 1365 (9th Cir. 1986). *See also Johnson*, 769 F.2d 1202.

[10] *E.g.*, *Farris v. Secretary of Health and Human Services*, 773 F.2d 85, 90 (6th Cir. 1985); *Stone v. Heckler*, 752 F.2d 1099, 1101 (5th Cir. 1985); *Johnson v. Heckler*, 769 F.2d at 1212; *Flynn v. Heckler*, 768 F.2d 1273, 1274 (11th Cir. 1985); *Brady v. Heckler*, 724 F.2d 914, 920 (11th Cir. 1984); *Evans v. Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984). *Brown v. Heckler*, 786 F.2d 870, 872 (8th

(Footnote Continued)

At least until he rescinded SSR 82-55 in October 1985 and SSR 82-56 in January 1986, the Secretary's step two severity policies did not adhere to the rule that no case would be denied at the threshold unless the impairment(s) could not possibly prevent substantial gainful activity regardless of the claimant's vocational factors, most importantly age. By implementing a policy that did not even consider age in this general way to assess a claimant's impairments at the threshold of the evaluation, the step two severity policies ceased to be a *de minimis* screening test. This was because the severity policies mandated that an impairment which could never be found disabling for a younger individual could also never be found to disable an older claimant even if that claimant's actual RFC might be sufficiently limited to require a finding of disability after a full evaluation. *E.g.*, SSR 82-55. As such, claims of older claimants—that had previously been approved and would otherwise have been approved after a full evaluation—were being denied at step two.

That the severity regulations permitted claimants to be summarily denied benefits based on medical evidence alone, when some consideration of a claimant's vocational factors such as age might have shown them to be potentially eligible for benefits, is significant. For it was on this ground that the court below invalidated the regulations. The *Yuckert* court correctly noted that the Act required the Secretary to consider "both medical and vocational factors" for claimants who showed an inability to do their

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Cir. 1986); *Hansen v. Heckler*, 783 F.2d 170 (10th Cir. 1986); *Yuckert v. Heckler*, 774 F.2d at 13; *Baeder v. Heckler*, 768 F.2d 547 (3rd Cir. 1985). *See also Dixon v. Heckler*, 785 F.2d at 1105. All of these decisions, including all of those that the Secretary cites in support of his position (at Pet. Br. 17-18), read the Act to invalidate any threshold severity step that authorizes the summary (medical evidence only) denial of benefits to any claimant with more than a *de minimis* impairment, and found that the severity policies at issue here exceeded that permissable bound. The only difference among the courts of appeals rulings is that some courts imposed a *de minimis* interpretation on the existing step two regulations, while others opted to strike down the regulations while allowing for—even inviting—the promulgation of valid step two regulations. The first six cases cited comprise the first group; the others, including the ruling below, the second. The only distinction among the cases, therefore, lies in the remedial avenue chosen to achieve compliance with the Act's requirements.

past work, *i.e.*, in making the ultimate determination of disability. *Yuckert*, 774 F.2d at 1368, 1369-70; *see* 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(A). Since the severity regulations precluded the consideration of vocational factors at all—when such consideration could make a difference in the ultimate determination of disability—the *Yuckert* court concluded that the regulations "conflict with the language of the statute that requires the Secretary, in determining disability, to consider [vocational] factors." *Yuckert*, 774 F.2d at 1369.[11]

B. The Severity Regulations, As Applied, Had A Disproportionately Adverse Impact On Older Claimants

In transgressing the permissible statutory bound of a threshold severity step, the Secretary's severity step regulations worked a disproportionate hardship on older (over 50) claimants. Older claimants, in particular, have been most wronged by the Secretary's step two severity policies because the complete exclusion of age at the severity step effectively preempted application of the grid concept that beginning after age fifty a less severe impairment can be disabling. *See supra* pp. 7-11. The result has been that claims were denied at step two when, if there had been full consideration of the medical evidence and vocational factors, the claim should have succeeded under the Act. Thus, the step two denial precluded claims raising more than *de minimis* impairments for elderly claimants.

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[11] AARP sharply disagrees with the Secretary's reading of *Yuckert*. He reads *Yuckert* to "require the decision maker to consider the vocational factors of age, education and work experience" at step two of the sequential evaluation process and, therefore, to prohibit the Secretary from employing any threshold "severity step" at all. *E.g.*, Pet. Br. at [illegible]. But the *Yuckert* court's reference to the required consideration of vocational factors is not an order to SSA that it consider such factors at the second step; rather, it explains why a step two severity test that precluded eligible claimants from proving disability by reference to vocational factors (*at a later step*) is not valid. *Yuckert*, 774 F.2d at 1370. For the same reason, *Yuckert's* invalidation of the severity regulations does not prohibit the Secretary from implementing a *de minimis* threshold step that, unlike the severity step, implicity considers these vocational factors.

The reported cases confirm the disproportionate impact. Thus, most of the claimants whose step two severity denials were reversed by the courts – on the ground that the severity regulations (applied to their claims) dictated a stricter than *de minimis* standard or had been read and applied by the Secretary in that (strict) fashion – were individuals age 50 or older.[12]

The facts of just three of these cases – one concerning a claimant "approaching advanced age," one a claimant "of advanced age" and one a claimant "close to retirement age," *see* 20 C.F.R § 404.1563(a), 416.963(c) – are instructive. They graphically demonstrate how faithful application of the severity step regulations resulted in a denial of disability benefits to older claimants (in each of the Secretary's own older age categories), even though the claimants met the statutory test to establish disability.[13]

[12] *E.g., Brown v. Heckler*, 786 F.2d 870, (8th Cir. 1986) (age 62); *Andrades v. Secretary HHS*, 790 F.2d 168 (1st Cir. 1986) (age 50); *Munoz v. Secretary HHS*, 788 F.2d 822 (1st Cir. 1986) (age 62); *Hansen v. Heckler*, 783 F.2d 170, 172 (10th Cir. 1986) (age 55); *Johnson v. Heckler*, 769 F.2d 1202 (Johnson age 55; Montgomery age 54); *Flynn v. Heckler*, 768 F.2d 1273 (11th Cir. 1985) (age 64); *Baeder v. Heckler*, 768 F.2d 548 (3rd Cir. 1985) (age 55); *Stone v. Heckler*, 752 F.2d 1099, 1100 (5th Cir. 1985) (age 62); *Davis v. Heckler*, 748 F.2d 293, 294 (5th Cir. 1984) (age 58); *Estran v. Heckler*, 745 F.2d 340, 341 (5th Cir. 1984) (age 58); *Evans v. Heckler*, 734 F.2d 1012, 1013 (4th Cir. 1984) (age 57); *Taylor v. Heckler*, 739 F.2d 1240, 1241 (7th Cir. 1984) (age 61); *Delgado v. Heckler*, 722 F.2d 570, 571 (9th Cir. 1983) (age 61); *Chico v. Schweiker*, 710 F.2d 947, 748 (2nd Cir. 1983) (age 57); *Blackburn v. Heckler*, 615 F.Supp. 908, 909 (N.D. Ill. 1985) (age 56); *Moody v. Heckler*, 612 F.Supp. 815, 824 (C.D. Ill. 1985) (age 52); *Oster v. Heckler*, 594 F.Supp. 523, 524 (D.N.D. 1984) (age 55); *Dixon v. Heckler*, 589 F.Supp. 1494, 1499 (S.D. N.Y. 1984), *affirmed* 785 F.2d 1102 (2nd Cir. 1986) (Carrasquillo age 59; Ramirez age 54); *McCullough v. Heckler*, 583 F.Supp. 934, 938 (N.D. Ill. 1984) (age 57); *Hundrieser v. Heckler*, 582 F.Supp. 1231 (N.D. Ill. 1984) (age 58); *Lucena v. Secretary HHS*, 572 F.Supp. 130 (D.P.R. 1983) (age 61); *Clemente v. Schweiker*, 564 F.Supp. 271, 272 (E.D.N.Y. 1983) (age 62); and *Scruggs v. Schweiker*, 559 F.Supp. 100, 104 (N.D. Tenn. 1982) (age 52).

[13] The facts of respondent's case are concededly not as telling. While AARP believes that Ms. Yuckert will be able to prove her eligibility for benefits if her claim is fully developed on remand and not short-circuited by a step two denial, her record at this point is not developed to an extent that clearly establishes her eligibility for benefits. The reported cases include literally dozens of courts

(Footnote Continued)

John Clemente, for example, was 62 years old; he had worked for 49 years as a longshoreman. *Clemente*, 564 F.Supp. at 272. There was no dispute that his residual capacity to work was less than that required by his medium and heavy past work. *Id.* His RFC was limited due to medical impairments that included three herniated discs[14], chronic bronchitis and emphysema, cervical (neck and shoulder) spondylosis rendering him unable to look up or down or to lift objects, hearing loss, and heart disease. *Id.*[15] Nevertheless, the ALJ ruled that all of his impairments were nonsevere because they were part of the "aging process", and he could do "most jobs." *Id.* In fact, had his claim been evaluated on the light grid, Clemente would have been found unable to work in any jobs. *E.g.*, 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 202.04 (light RFC).[16]

of appeals decisions – all disapproving the Secretary's step two severity policies – that the Secretary might plausibly have brought to this court for review. He chose, however, to press the case of an individual claimant who had never even seriously challenged the regulations at issue (*Yuckert*, 774 F.2d at 1367) and never developed the factual record that might ordinarily accompany such a challenge. *Compare Yuckert* with *Dixon v. Heckler*, 785 F.2d 1102 (2nd Cir. 1986). AARP is not suggesting that the choice of an undeveloped claim was an ethically impermissable one; but this Court should not assume that Ms. Yuckert's case as currently developed is truly representative of claimants denied disability benefits on the ground that their impairments were "not severe."

[14] "Herniated discs" are ruptured intervertebral discs (nucleus pulposus) that protrude outside of the disc space. Symptoms of pain, weakness, muscle spasms, etc. result from the protrusion pressing onto the central nervous cord or a nerve root. The Merck Manual at 1466-71 (Berkow, 13th Ed. 1977).

[15] "Spondylosis" indicates degenerative changes of the spine in the vertebrae around the disc space and is usually associated with chronic, i.e., permanent, disc disease. Stedman's Medical Dictionary, Williams and Wilkin (24th Ed. 1982). *See also* The Merck Manual at 1469 (1977).

[16] Other illustrative nonsevere denials that were successfully appealed by claimants in this "closely approaching retirement age" (60-64) category include: *Brown*, 786 F.2d at 870 (Medical impairments are (1) cervical (neck), lumbar [lower back] spine arthritis; (2) early obstructive lung disease; and (3) psychophysical musculoskeletal reaction which closely approached the step three listing at 20 C.F.R. part 404, Subpart P, Appendix 1, § 12.07, all of which

(Footnote Continued)

A review of the cases reporting "not severe" denials of claimants age 55-60 tells the same story. Edwin Oster, for example, was 55 years old. *Oster*, 594 F.Supp. at 524 (D.N.D. 1984). He was illiterate, and his past work was as a livestock handler and egg handler. *Id.* The ALJ found him disabled because he was limited to sedentary RFC due to a heart condition described as three vessel coronary artery disease that also caused right arm numbness after exertion, emphysema, and back problems. *Id.* at 524, 527. The Appeals Council reversed the favorable decision and ruled that the proper decision was a nonsevere denial even though Oster could not perform his past work due to his impairments. As the ALJ had shown, a full evaluation of the claim mandated the award of benefits.[17]

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establishes her medical inability to perform past clerical work); *Flynn*, 768 F.2d at 127 (Medical impairments are: essential hypertension, with related headaches, dizziness, and end organ changes creating a high risk of stroke or heart attack and establishing her medical inability to return to her past work); and *Taylor*, 739 F.2d at 1241 (Medical impairments are: (1) depression rendering her unable to perform tedious tasks, be near children or get out of bed and (2) arthritis with pain and swelling in her hands which established her inability to continue her 22 year career as an elementary school teacher).

[17] Other illustrative nonsevere denials that were successfully appealed by claimants who were of "advanced age" include: *McCullough*, 583 F.Supp. at 938 (Medical impairments are: thrombophlebitis (blood clot) in left leg that limited him to light RFC establishing his medical (RFC) inability to do his past work and, under the grid Rule 202.01, his right to benefits); *Estran*, 745 F.2d at 341 (Medical impairments are: mental retardation (I.Q. of 69), depressive neurosis, somatization disorder, arthritis, angina, and complaints of dizzy spells establishing impairments that met the step three listing. 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.05(c) (1986)); *Evans*, 734 F.2d at 1013-14. (Medical impairments are, *inter alia*, asthma with bronchitis, hypoxemia (low oxygen in the blood), and moderately severe chronic obstructive pulmonary disease with bronchospasm that led the Veterans Administration to find him "totally and permanently" disabled and establishing impairments that met or equalled the step three listing); *Hundreiser*, 582 F.Supp. at 1234. (Medical impairments are: a degenerative knee problem requiring surgery and that he walk with a cane, carpal tunnel syndrome (pain, numbness and reduced ability to grasp or hold objects) in the nerves of both hands, degenerative disc disease, and hypertension establishing, even according to the ALJ, the medical (RFC) inability to perform his past heavy work as a maintenance mechanic); *Johnson*, 769 F.2d at 1206. (Medical impairments are diabetes mellitus, lumbago, duodenal ulcer,

(Footnote Continued)

Finally, in the 50-54 year category, the examples are as stark. Mr. Moody, a 52-year-old former bartender, was denied benefits at step two even though he had principally resided in a state mental health center, nursing homes, or alcoholism treatment centers due to his impairments. *Moody*, 612 F.Supp. at 824. His impairments were heart disease (possible post infarction with an abnormal electrocardiogram, and angina pain), chronic obstructive pulmonary (lung) disease, personality disorders (diagnosed as passive/aggressive, explosive, and paranoid), depression, alcoholism, and leg pains due to intermittent claudication.[18] *Id.* at 824-825. The Court found that each impairment considered alone met the statutorily authorized *de minimis* test because each limited Mr. Moody more than slightly.[19]

The facts of these cases, and a review of the others, conclusively establish the adverse impact that step two severity policies as applied by the ALJs and the Appeals Council had on older

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Echazski's ring of the esophogus and anxiety neurosis establishing her RFC as sedentary rendering her unable to perform her past medium work as a nurse's aide and eligibility under the grid, 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 201.01).

[18] "Intermittent claudication" is "a condition caused by ischemia of the muscles due to sclerosis with narrowing of the arteries; it is characterized by attacks of lameness and pain, brought on by walking, chiefly in the calf muscles; however, the condition may occur in other muscle groups." Stedman's Medical Dictionary at 288.

[19] Other cases where the step two "not severe" denial was successfully appealed by claimants who were closely approaching "advanced age" include: *Dixon*, 589 F.Supp. at 1499-1500 (the medical impairments of Raminez, one of the named plaintiffs, are: the loss of one eye, chronic low back pain syndrome, and degenerative changes at the lumbosacral (lower back) spine establishing limited range of motion to 20° straight leg raising (instead of 90°) and 30° bending at the knee (instead of 110°) which established a medically reduced RFC). *Johnson*, 769 F.2d at 1206 (Medical impairments of Montgomery are: hypertension, ischemic heart disease with angina pectoris, diabetes, mild obesity, degenerative osteoarthritis of the spine, and the residual effects of fractures of the hip, leg, and foot, which limited him to sedentary RFC establishing inability to perform his past heavy work as a butcher and leading the ALJ to find Mr. Montgomery disabled at step five. 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 201.01. The Appeals Council overruled the ALJ "error" to issue a "not severe" denial despite the limited RFC and inability to do past work).

claimants. In particular, many of these older claimants would have succeeded had their age and inability to perform their past work due to their medical impairments been factored into the severity threshold test, as is contemplated by a valid *de minimis* step.

Where the denials of step two reached a peak of 45.2% of all the final disability decisions in 1981, House Committee on Ways and Means, 98th Cong. 1st Sess., WMCP 98-2, "Background Material and Data" at Table 3, p. 79 (Feb. 8, 1983), and the cases reaching the Court reflected denials defended by the Secretary which far exceeded that which would indicate application of a *de minimis* step, AARP fails to see how the Secretary can now, in good faith, defend his step two regulations as *de minimis*. Since the Court below invalidated the regulations as applied, that decision should be affirmed. If the Secretary wishes to develop a valid screening step in his sequence, the order below in no way prevents him from doing so by promulgating a new regulation. The present step, however, should not be allowed to continue to be used to the detriment of all – but in particular older – claimants.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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